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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

	)	2 CA-JV 2008-0073
	)	DEPARTMENT B
	)	
IN RE VICTOR B.	)	MEMORANDUM DECISION
	)	Not for Publication
	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 15745302

Honorable Theodore J. Knuck, Judge Pro Tempore

AFFIRMED

Barbara LaWall, Pima County Attorney
By Grace Atwell
Tucson
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Robert J. Hirsh, Pima County Public Defender
By Susan C. L. Kelly
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V Á S Q U E Z, Judge.

¶1 The juvenile court adjudicated Victor B. delinquent for having possessed marijuana and placed him on a six-month term of probation supervision. Victor appeals, challenging the juvenile court's denial of his motion to suppress evidence, his request for

separate suppression and adjudication hearings, and the sufficiency of the evidence that he possessed a usable quantity of marijuana.

Motion to Suppress

¶2 In reviewing a ruling on a motion to suppress, "[w]e review only the evidence presented at the suppression hearing, and we view it in the light most favorable to upholding the juvenile court's factual findings." *In re Ilono H.*, 210 Ariz. 473, ¶ 2, 113 P.3d 696, 697 (App. 2005) (citation omitted). A Tucson police officer stopped a car for traffic violations. When the officer approached the car, he smelled the odor of burnt marijuana, noticed a second person inside, and called for backup. He asked the second officer who arrived at the scene to talk to the passenger, Victor, and arrested the driver.

¶3 The second officer gave the following testimony on direct examination.

> A. As I approached the vehicle the window was rolled down and I could smell burnt marijuana coming from within the vehicle. And that's where I asked . . . the minor if he could step out of the vehicle. Gained his name, his date of birth. And I asked him if he was smoking any marijuana.
>
> Q. And what did he say?
>
> A. He said that he wasn't and he didn't have any so I asked if he had any weapons or anything illegal in his possession and he said he did not so he consented to a search.
>
> Q. You asked if he would consent to a search?
>
> A. Correct.
>
> Q. And what did you do then?

A. I did a pat down on him and found a bulge inside of his front left pant pocket and I asked him what that was and he said it was marijuana.

Q. And did you remove the object then?

A. Yes, I did.

The officer did not testify on direct examination about how Victor had consented to the search. He admitted on cross-examination that he had not "actually ask[ed] [Victor] for permission" to search but had said, "you don't mind if I pat you down." He testified, however, that he had not threatened Victor, made any "displays of force," told him he was under arrest, or forcibly detained him. He insisted that Victor had been free to leave at any time before he admitted having marijuana and that the entire encounter to that point had lasted only a "[c]ouple of minutes."

¶4 Victor moved to suppress both his statements and the marijuana. He argued that his statements were inadmissible because the officer had failed to warn him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and that he had made the statements involuntarily. He contended the marijuana was the fruit of a *Miranda* violation and an illegal search to which he had not validly consented.

¶5 The state argued no *Miranda* violation had occurred, because Victor had not been subject to custodial interrogation, and that "no evidence of coercion, duress, or threats, either explicit or implicit," existed to invalidate his consent to the search. The juvenile court denied the motion "based on the consent [to] the search." We review a "ruling on a motion

to suppress evidence for an abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo." *State v. Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d 1119, 1140 (2004) (citation omitted); *see also In re Maricopa County Juv. Action No. JT30243*, 186 Ariz. 213, 216, 920 P.2d 779, 782 (App. 1996) (appellate court reviews factual determinations for "clear and manifest error" but questions of law de novo).

¶6 We first address whether Victor consented to the search the officer conducted, noting initially that Victor has not challenged the fact he had consented, but only whether his consent was voluntary. The state had the burden of proving voluntariness based on the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973); *see also State v. Paredes*, 167 Ariz. 609, 612, 810 P.2d 607, 610 (App. 1991) ("The state must establish by clear and positive evidence that consent to search was freely and intelligently given."). "Voluntariness is a question of fact," *State v. Davolt*, 207 Ariz. 191, ¶ 29, 84 P.3d 456, 468 (2004), which we review for "'clear and manifest error.'" *Maricopa County No. JT30243*, 186 Ariz. at 216, 920 P.2d at 782.

¶7 Victor argues that "juveniles . . . are inherently vulnerable and prone to feeling compelled to comply with the requests of an adult authority figure." He concludes that "[t]he totality of the circumstances in the present case clearly indicates a lack of voluntariness." But Victor's youth was only one factor relevant to this issue. It did not, without more, compel a finding that the consent had been involuntarily given. *See Schneckloth*, 412 U.S. at 226. As noted above, the officer testified that the encounter had

occurred during the afternoon and had lasted only a couple of minutes. The officer also testified that he had not threatened Victor, and there was simply no evidence that Victor appeared nervous or distressed at any time. In the analogous context of determining the voluntariness of a confession, "coercive police activity is a necessary predicate" to finding involuntariness. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Nothing in the record before us establishes the officer had engaged in any coercive activity in this case. Based on the totality of the evidence presented, we cannot find the juvenile court committed clear and manifest error when it found Victor had voluntarily consented to a search.

¶8 However, our analysis does not end there. Assuming Victor voluntarily consented to the officer's request, it is undisputed that the officer only asked for permission to "pat [Victor] down." Thus, the officer's action in reaching into Victor's pocket exceeded the scope of the consent Victor had given, and consent alone did not justify admission of the marijuana. *See Paredes*, 167 Ariz. at 612, 810 P.2d at 610 ("The scope of a consensual search is limited to the scope of the consent given."). Similarly, a voluntary consent to the pat-down search did not justify the admission of Victor's statement that the bulge in his pocket was marijuana.

¶9 Victor argues he had made this statement in response to unwarned, custodial interrogation and that the marijuana therefore constituted the fruit of a *Miranda* violation. He also argues that his statement was involuntary. "'Voluntariness and *Miranda* are two separate inquiries.'" *In re Jorge D.*, 202 Ariz. 277, ¶ 19, 43 P.3d 605, 609 (App. 2002),

quoting State v. Montes, 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983). "Preclusion of involuntary confessions is based on the Due Process Clause of the Fourteenth Amendment [of the United States Constitution] and applies to confessions that are the product of coercion or other methods offensive to due process." *Id.* ¶ 19. In contrast, "*Miranda* is based on the Fifth Amendment privilege against self-incrimination." *Id.* Although the exclusionary rule announced in *Wong Sun v. United States*, 371 U.S. 471 (1963), applies to statements taken in violation of *Miranda*, it does not apply to the physical fruit of an unwarned, yet voluntary statement. *United States v. Patane*, 542 U.S. 630, 636-37 (2004).

¶10 The parties dispute whether *Miranda* applied to Victor's statement that the item in his pocket was marijuana, but we need not decide that issue. For the same reasons we have concluded the juvenile court did not err when it found, albeit implicitly, that Victor's consent to the pat-down search was voluntary, we see no error in the court's additionally implicit finding that the statement had been made voluntarily. "In Arizona, a suspect's statement is presumptively involuntary," *State v. Ellison*, 213 Ariz. 116, ¶31, 140 P.3d 899, 910 (2006), but "[a] prima facie case for admission of a confession is made when the officer testifies that the confession was obtained without threat, coercion or promises of immunity or a lesser penalty," *State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979). The officer's testimony about his encounter with Victor and his express denial of having threatened Victor in any way sustained the state's burden of establishing the statement was voluntary. And, Victor offered no evidence to the contrary. Victor's

statement that he had marijuana in his pocket gave the officer probable cause to arrest him and conduct a search incident to his arrest. *See Chimel v. California*, 395 U.S. 752, 763 (1969). Because the marijuana was therefore admissible under *Patane*, any error in admitting the statement as well was harmless beyond a reasonable doubt. *See State v. Devaney*, 18 Ariz. App. 98, 100, 500 P.2d 629, 631 (1972) ("The admission into evidence of a defendant's statements obtained in violation of *Miranda* can be harmless beyond a reasonable doubt."). Thus, we find no reversible error in the juvenile court's denial of Victor's motion to suppress.

¶11 Victor relies on *In re Pima County Juvenile Action No. J-103621-01*, 181 Ariz. 375, 891 P.2d 243 (App. 1995), and *State v. Valle*, 196 Ariz. 324, 996 P.2d 125 (App. 2000), for the proposition that the marijuana constituted the fruit of an illegal search. But those cases are readily distinguishable. In *Pima County No. J-103621-01*, a police officer patted down the juvenile without asking permission and without reasonable suspicion that the juvenile was armed or dangerous. 181 Ariz. at 376-77, 996 P.2d at 244-45. During the pat-down, the officer felt a square object he could not identify; he asked the juvenile what the object was, and the juvenile answered that it was a pager. *Id*. at 376, 996 P.2d at 244. When the juvenile pulled the pager out of his pocket, however, "a plastic baggie containing a small amount of marijuana" came out with it. *Id*. This court reversed the juvenile court's order denying the juvenile's motion to suppress. *Id*. at 378, 966 P.2d at 246. But the decision was based on the officer's having conducted a pat-down search in

violation of *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* allows an officer to conduct a pat-down search for the limited purpose of detecting weapons for the officer's safety. *Terry* is inapplicable here, where the officer purportedly searched Victor because Victor had consented and not because the officer reasonably suspected Victor was armed. Unlike a search pursuant to *Terry*, a search based on consent need not be supported by reasonable suspicion.

¶12 *Valle* also involved a *Terry* search. The issue there was whether the officer had exceeded the scope of an initially justified *Terry* pat-down. *Valle*, 196 Ariz. 324, ¶ 7, 996 P.2d at 127. During the pat-down, the officer "felt 'an object' in the right front pocket of [Valle]'s pants." *Id*. ¶ 4. Without first determining what the object was, the officer reached into Valle's pocket and retrieved the object. *Id*. Division One of this court found the officer's action had not been justified under either *Terry* or the "plain feel" doctrine announced in *Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993), because there was no evidence the item was readily identifiable as either a weapon or contraband. *Valle*, 196 Ariz. 324, ¶¶ 10, 12, 996 P.2d at 129. In this case, as explained above, Victor consented to a pat-down search, and his voluntary statement about the item the officer had felt in his pocket gave the officer probable cause to believe the item was contraband. Even assuming the officer questioned Victor in violation of *Miranda*, the fruit of that questioning was admissible. *See Patane*, 542 U.S. at 636-37.

Request for Separate Hearing

¶13 At the adjudication hearing, Victor's counsel told the court she would "prefer that the Court not consolidate" the adjudication and suppression hearings, apparently because she believed it would be "hard to distinguish" Victor's testimony on the motion to suppress from the evidence for the adjudication. She asked, therefore, that "if the Court is inclined to consolidate[,] any testimony that [Victor] gives [should] be limited to the motion to suppress." The court assured counsel that Victor would be able to testify as to the motion to suppress without "giving up . . . his Fifth Amendment rights," explaining its normal procedure for conducting a consolidated hearing. Victor's counsel did not object further, and the hearing proceeded. Victor did not testify on either the motion to suppress or the adjudication.

¶14 On appeal, Victor contends that, by hearing the motion to suppress and the delinquency adjudication together, the juvenile court violated his "right[s] to a fair trial, equal protection and due process" and that "the suppression motion hearing should have been heard before a separate trier of fact, as it is in the adult arena." But Victor did not raise these arguments below. "Normally, failure to raise a claim at trial waives appellate review of that claim, even if the alleged error is of constitutional dimension." *State v. Lefevre*, 193 Ariz. 385, ¶ 15, 972 P.2d 1021, 1025 (App. 1998). To the extent Victor contends the issues he raises on appeal "may go so far as to constitute fundamental error," we disagree and find his arguments meritless in any event.

¶15 As Victor acknowledges, Rule 14, Ariz. R. P. Juv. Ct., expressly permits the juvenile court to consolidate "any combination of hearings," except those relating "to transfer to another court." Moreover, concerns about the prejudicial effect on a jury of evidence presented at a suppression hearing are absent in the context of juvenile adjudication hearings, where the finder of fact is the judge. Contrary to Victor's suggestion otherwise, the juvenile court judge was capable of assessing the evidence for its relevance to separate issues and applying the appropriate burdens of proof. Absent any indication on the record otherwise, we presume he did so. *See State v. Warner*, 159 Ariz. 46, 52, 764 P.2d 1105, 1111 (1988) (trial court presumed to know and apply rules of evidence and burden of proof). We find nothing in the record supporting Victor's assertion that consolidation caused confusion during the hearing; the record on appeal is sufficiently clear for purposes of our review. The juvenile court did not err, fundamentally or otherwise, by holding a consolidated hearing.

Sufficiency of Evidence

¶16 Victor argued in his opening brief that the evidence was insufficient to show that the marijuana he had possessed was a usable quantity. In a notice of supplemental authority, he acknowledged the Arizona Supreme Court's holding in *State v. Cheramie*, 218 Ariz. 447, ¶ 21, 189 P.3d 374, 378 (2008), that "[a] 'usable quantity' is neither an element of the possession offense nor necessary to sustain a conviction for it." He asserts, however,

that "*Cheramie* represents a significant change in the law, and is thus not retrospectively applicable to the present appeal."

¶17 Regardless of the application of *Cheramie*, however, sufficient evidence supported the juvenile court's finding that Victor had possessed a usable quantity of marijuana. The court based its decision on its visual inspection of the marijuana admitted. We defer to the court, which had the opportunity to view the evidence. *Cf. In re Richard B.*, 216 Ariz. 127, ¶ 12, 163 P.3d 1077, 1080 (App. 2007) ("Because the juvenile court is in the best position to . . . analyze exhibits for purposes of restitution, we defer to its factual findings so long as reasonable evidence exists to support such findings.").

¶18 The juvenile court's order adjudicating Victor delinquent and the disposition are affirmed.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
J. WILLIAM BRAMMER, JR., Judge